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Supreme Court, U.S.
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No. 99-6615
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IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE WILLIAMS,

Petitioner

v.

JOHN B. TAYLOR, WARDEN,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and on Application for Stay of Execution

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Fourth Circuit's conclusion – that Williams' "improper cross-examination" claim would create an impermissible "new rule" and, in any event, would amount to harmless error under Brecht v. Abrahamson – render the ultimate outcome of this Court's decision in Portuondo v. Agard irrelevant to Williams' petition?

2. Does the Fourth Circuit's conclusion – that Williams was not entitled to a federal evidentiary hearing even under pre-AEDPA law – render moot Williams' "conflict" argument regarding the proper interpretation of AEDPA's § 2254(e)(2)?

3. Is there any "compelling reason" to review the Fourth Circuit's straightforward interpretation of 21 U.S.C. § 848(q)(9), in view of the fact that the court below is the only federal appeals court to have decided the issue?

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STATEMENT OF THE CASE

Michael Williams has been sentenced to death for premeditatedly murdering six people while on parole during a two-month period spanning from late December of 1992 to late February of 1993. The Virginia Supreme Court found the facts surrounding the capital murders of Mr. and Mrs. Morris Keller to be as follows:

> Between 9:30 and 10:30 p.m., on Saturday, February 27, 1993, Verena Lozano James drove [Michael] Williams and [Jeffrey] Cruse to a rural area in Cumberland County and left them approximately one-half mile from Bear Creek Market. Williams and Cruse planned to rob persons in the market with a .357 caliber Ruger Black Hawk revolver that Williams had given to Cruse.
>
> The two men walked to the store, but found it closed. Williams suggested that "he knew a house where we can go; they'd have a couple thousand dollars." Cruse agreed, and they walked some distance to the Kellers' house. Upon arrival at the Kellers' house, Cruse returned the Black Hawk revolver to Williams and Cruse knocked on the door. When Mr. Keller opened the door, Williams pointed the gun at him and both men entered the house.
>
> Williams ordered the Kellers to remove all their clothes, and he remained in the kitchen with them while Cruse began searching the house for money and other valuables. After Cruse found a fully loaded .38 caliber handgun, Williams decided "to tie [the Kellers] up," and Cruse did so. The Kellers were then placed, first in one closet and later in separate closets, and both men resumed their search.
>
> After the two men had assembled some of the Kellers' property in the living room, at Williams's suggestion, first Williams, then Cruse, raped Mrs. Keller. Afterwards, Williams ordered both Kellers to take showers and put on clean clothes, which they did. Williams then directed the Kellers to "take a walk" with them. Upon hearing that the two men planned to burn the house, Mrs. Keller took the Kellers' marriage certificate with her. As the Kellers, Williams, and Cruse left the house and walked "[d]own on a dirt road and into a thicket," Williams was carrying the .38 caliber handgun and Cruse was carrying the Black Hawk revolver.
>
> When they were in the thicket with Williams standing behind Mr. Keller and Cruse standing behind Mrs. Keller, Williams said, "We'll shoot at the count of three." Upon Williams's count of three, he shot Mr. Keller with the .38 caliber handgun and Mr. Keller fell to the ground. However, Cruse did not shoot Mrs. Keller. Williams told Cruse to shoot Mrs. Keller because "he didn't want to leave no witnesses." Cruse then shot Mrs. Keller once with the Black Hawk revolver. After Mrs. Keller fell, Mr. Keller stood up and Williams shot him again with the .38 caliber handgun. As Cruse started to walk away, Williams said, "Wait...[w]hat if they ain't dead?", and he shot each of the Kellers "a couple more times apiece" with the .38 caliber handgun.
>
> The two men returned to the house, where they loaded a television set, microwave oven, shotgun, stereo set, and speakers into Mr. Keller's jeep and, at Williams's suggestion, set fire to the house. Williams and Cruse then took the jeep to Fredericksburg, where they sold some of the stolen property the next day. They then threw the remaining stolen property and the Black Hawk revolver into the Rappahannock River and set fire to the jeep.
>
> Upon hearing of the Keller fire on Monday morning, Verena James advised the police that she had taken Williams and Cruse to an area not far from the Keller house on the night of the fire. Consequently, the police sought to question the two men regarding the fire. Williams and Cruse returned to Cumberland County the Monday following the murders and the police were able to question Cruse. Williams, however, fled to Florida.
>
> At first, Cruse furnished no information of value to the police. However, after the police discovered the bodies of the Kellers on Tuesday, Cruse consulted counsel. His counsel obtained a conditional agreement from the Commonwealth that it would not seek the death penalty provided Cruse gave a truthful statement of his knowledge of the crimes. Cruse then furnished information that implicated both men in all of the crimes charged, except for Cruse's role in Mrs. Keller's rape. Because Cruse breached his agreement in failing to tell the police that he had raped Mrs. Keller, the Commonwealth also indicted him for the Kellers' capital murders.
>
> Testifying in his own defense, Williams agreed with Cruse: (1) that Williams was the one who suggested robbing persons at the store; (2) that Williams was the first one to shoot Mr. Keller and that Cruse was the first one to shoot Mrs. Keller; and (3) that it was Williams's idea to burn the Keller house. However, Williams (1) denied that he raped Mrs. Keller; (2) claimed that Cruse fired all the subsequent shots into the Kellers' bodies, and (3) contradicted other details of Cruse's testimony about who had suggested some of their activities during and after the murders.

> Lisa C. Schiermeier, a serologist, tested the seminal fluid recovered from Mrs. Keller's vagina as a part of the Physical Evidence Recovery Kit prepared by Dr. Deborah Kay, an assistant chief medical examiner who performed the autopsy on Mrs. Keller. Schiermeier compared that sample with the blood types of Cruse, Williams, and Mr. Keller. Schiermeier testified that her comparison indicated only Williams could have contributed a certain type of seminal fluid found in the sample.[1] Dr. George C. Li, a DNA expert who performed a DNA test on the spermatozoa from the sample, testified that his test results were consistent with a conclusion that Cruse and Williams jointly contributed the seminal fluid.

Williams v. Commonwealth, 450 S.E.2d 365, 369-370 (Va. 1994). See § 2254(e)(1) (state court findings of fact must be presumed correct and petitioner may overcome presumption only by clear and convincing evidence); see also Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's recitation of historical facts).

On January 6, 1994, after a four-day trial, a jury in Cumberland County, Virginia, convicted Williams of burglary, rape, arson, two counts of robbery, two counts of abduction, and five counts of capital murder. On the non-capital charges, the jury fixed Williams' punishment at 20 years for the burglary, life imprisonment for the rape, 50 years and a $100,000 fine for the arson, 40 years for each of the robberies, and 10 years for each of the abductions. On that same date, the trial court imposed these sentences and entered final judgment on the non-capital charges.

After a separate penalty proceeding, the jury sentenced Williams to death for the capital murders of both Mr. and Mrs. Keller, finding in both instances that Williams represented a continuing serious threat to society ***and*** that his offense was outrageously or wantonly vile, horrible

[1] Williams erroneously asserts that "[f]orensic tests...determined that if there was only one sperm donor, it was Cruse." (Ptn. 5 n.4). The forensic analysis detected the presence of "PGM subtype 2-" on Mrs. Keller's vaginal swab. (Resp. App. 3). Of Williams, Cruse and Mr. and Mrs. Keller, only the petitioner possessed the "PGM subtype 2-" enzyme. (Resp. App. 4).

or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. See Va. Code § 19.2-264.4. The trial judge conducted yet another sentencing proceeding on February 22, 1994, at which the court considered additional evidence introduced on Williams' behalf. At the conclusion of that hearing, however, the court imposed both death sentences.

Williams' capital murder convictions and death sentences were affirmed by the Supreme Court of Virginia on November 4, 1994. Williams v. Commonwealth, 450 S.E.2d 365 (Va. 1994). With respect to the additional aggravating evidence which warranted Williams' death sentences, the state court found as follows regarding four other murders committed by petitioner:

> Williams confessed to John Howard Williams, his brother, that [in December of 1992] he had shot and killed...four men [in Prince Edward County] and set fire to the house [where he left the victims' bodies]. The court permitted the Commonwealth to introduce photographs of each victim's head showing that each had been shot in the head and that parts of the head were partially burned.
>
> * * *
>
> ...Prior to the Prince Edward murders, Williams had no convictions for violent crimes, but he had several felony convictions for automobile theft and for possession of marijuana. However, we must also consider that Williams was the sole participant in the Prince Edward County murders and arson.[2] Further, Williams suggested the robberies, the rapes, the execution-type killings of the Kellers, and the arson of their house. In our opinion, this evidence amply justifies the jury's finding of the "vileness" of the Keller murders and of Williams's "future dangerousness."

Williams, 450 S.E.2d at 377, 379. Once again, the state court's findings of historical fact must be presumed correct. See also § 2254(e)(1); Sumner v. Mata. Williams requested rehearing, but the Virginia Supreme Court denied his petition on January 13, 1995.

[2] At final sentencing before the trial judge, Williams admitted his responsibility for the Prince Edward County murders. (JA 356-357). ["JA ___" references are to the joint appendix in the Fourth Circuit, a copy of which has been lodged with this Court]. Williams subsequently pleaded guilty to capital murder and three counts of first-degree murder in Prince Edward and was sentenced to four terms of life imprisonment plus fourteen years.

Williams then filed a petition for a writ of certiorari. This Court, however, denied the petition on June 26, 1995, thus marking the end of Williams' direct appeal. Williams v. Virginia, 515 U.S. 1161 (1995).

On August 10, 1995, the state trial court appointed an experienced attorney to represent Williams in his state habeas corpus proceedings. Williams filed an initial habeas petition in the Virginia Supreme Court on August 30, 1995. On December 15, 1995, however, the Supreme Court granted Williams' request for leave to file an amended petition. On January 29, 1996, he filed a 200-page amended petition, raising over 60 habeas claims. The Virginia Supreme Court dismissed Williams' amended petition on March 18, 1996. Williams' subsequent petition for a writ of certiorari again was denied by this Court. Williams v. Netherland, 519 U.S. 877 (1996).

On May 14, 1996, pursuant to Virginia Code § 53.1-232.1, the trial court set Williams' execution for July 11, 1996. On July 3, 1996, however, the United States District Court for the Eastern District of Virginia granted Williams' request for a stay of execution. Williams filed his federal petition on November 20, 1996, approximately seven months after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). On July 16, 1997, the district court denied Williams' request for discovery, specifically finding that he had failed to establish "good cause" as required by Rule 6(a), Rules Governing Section 2254 Cases. On April 13, 1998, the district court dismissed all of Williams' habeas claims except for three claims which the lower court initially thought warranted an evidentiary hearing.

On April 20, 1998, the Warden filed a motion for summary judgment. On May 15, 1998, the district court denied Williams' renewed request for discovery, declined to rule on the Warden's motion for summary judgment and scheduled the evidentiary hearing for a date certain. The Warden then filed a petition for a writ of mandamus and prohibition, asking the United States Court of Appeals for the Fourth Circuit to require the lower court to determine whether Williams' three

claims warranted an evidentiary hearing under AEDPA's 28 U.S.C. § 2254(e)(2). On May 27, 1998, the Fourth Circuit stayed the district court's order awarding Williams an evidentiary hearing and directed the lower court to apply § 2254(e)(2) to Williams' claims.[3] On remand, the district court applied § 2254(e)(2) to Williams' claims, determined that he was not entitled to a hearing and dismissed Williams' petition in its entirety. Williams v. Netherland, 6 F. Supp. 2d 545 (E.D. Va. 1998).

Williams filed a Rule 59(e) motion to alter or amend which the district court denied on November 12, 1998. Williams then filed yet another Rule 59(e) motion which the district court denied on December 15, 1998.

On August 2, 1999, the Fourth Circuit affirmed the district court's denial of relief. Williams v. Taylor, ___ F.3d ___ (4th Cir. 1999). (Ptn. App. 2-8). On August 27, 1999, the Court of Appeals denied Williams' petition for rehearing and rehearing en banc. (Ptn. App. 1). Pursuant to Virginia Code § 53.1-232.1(iii), on September 1, 1999, the state trial court scheduled Williams' execution for October 28, 1999. The Fourth Circuit denied Williams' request for a stay of execution on October 14, 1999.

REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

I. THIS COURT'S ULTIMATE DECISION IN PORTUONDO v. AGARD CAN HAVE NO EFFECT ON THE FOURTH CIRCUIT'S REJECTION OF WILLIAMS' SIXTH AMENDMENT CLAIM REGARDING THE PROSECUTOR'S CROSS-EXAMINATION.

Petitioner contends that the prosecutor violated his Sixth Amendment right to be present and to confront adverse witnesses by cross-examining him about the obvious fact that he had

[3] The Court of Appeals did not issue a writ of mandamus or prohibition, but the Warden's request for such a writ remained pending in the Fourth Circuit until it was dismissed as moot at the conclusion of the district court proceedings.

heard all of the other witnesses testify before he testified at the guilt stage of trial. According to Williams, at the very least this Court should grant him a stay of execution pending the outcome of this Court's review of the Second Circuit's decision in Agard v. Portuondo, 117 F.3d 696 (2d Cir. 1997), modified on rehearing, 159 F.3d 98 (2d Cir. 1998), cert. granted, 119 S.Ct. 1248 (1999). This Court's ultimate decision in Agard, however, will have no impact upon the validity of the Fourth Circuit's rejection of petitioner's claim.

The Court of Appeals did not reach the merits of Williams' Sixth Amendment claim. Instead, the Fourth Circuit correctly ruled that the granting of collateral relief upon such a claim would violate the "new rule" doctrine. See Williams, ___ F.3d at ___. (Ptn. App. 7). The Court of Appeals also concluded that, even if the "new rule" doctrine did not apply, any error by the prosecutor was harmless under the controlling standard on collateral review. Id. at ___, applying Brecht v. Abrahamson, 507 U.S. 619 (1993). (Ptn. App. 7).

In Agard, this Court granted the State's petition to review the merits of the Second Circuit's conclusion that a trial prosecutor's ***jury argument*** violated the Sixth Amendment and due process by asserting that a defendant's testimony is less credible simply by virtue of the fact that he testified after having heard all the other witnesses testify. New York has not raised a "new rule" defense in this Court.[4] (See New York's Brief in Portuondo v. Agard, No. 98-1170 at pp. 13-16). The granting of certiorari in Agard, therefore, can have no adverse effect on the validity of the Fourth Circuit's judgment that Williams is seeking an impermissible "new rule" or the Court of Appeals' judgment that any possible error in his case was harmless under Brecht's

[4] New York did not raise a "new rule" defense until its petition for rehearing in the Second Circuit, which expressly declined to consider the issue because it had been raised too late. See Agard, 159 F.3d at 99-100. New York chose not to raise a "new rule" argument in either its petition for a writ of certiorari or its subsequent merits briefs in this Court.

"substantial and injurious effect or influence" standard.[5] See generally Black v. Cutter Laboratories, 351 U.S. 293, 297-298 (1956) (purpose of certiorari is to review "judgments, not statements in opinions").

The Fourth Circuit's conclusion that Williams' claim is barred by the "new rule" doctrine clearly does not warrant this Court's review. Indeed, this Court's granting of certiorari in Agard to decide ***whether*** the prisoner's claim in that case has any merit demonstrates the correctness of the Fourth Circuit's decision that such a claim cannot prevail on federal collateral review where, as here, the State is asserting the "new rule" defense. As the Fourth Circuit found, neither of the cases upon which Williams relies – Griffin v. California, 380 U.S. 609 (1965), and Brooks v. Tennessee, 406 U.S. 605 (1972) – "compels" or "dictates" the granting of relief upon his Sixth Amendment claim.[6] See Williams, ___ F.3d at ___. (Ptn. App. 7). Indeed, in the district court,

[5] Agard, moreover, also is distinguishable from Williams' case because the Second Circuit carefully limited its decision to claims based upon a prosecutor's ***jury argument***, as opposed to cross-examination. See Agard, 117 F.3d at 708 ("We...express no opinion as to the...constitutionality of similar remarks made during cross-examination"); id. ("summation remarks raise constitutional issues which either are not present or are of less concern when made upon cross-examination"). At no time in state court did Williams ever object to the prosecutor's jury argument, as opposed to cross-examination. Indeed, no such claim was ever raised in the district court or the court below. His belated attempt to focus upon the prosecutor's jury argument (Ptn. 6, n.5) in order to make the claim fit the Agard mold clearly is barred by his procedural default. See generally Breard v. Greene, 118 S.Ct. 1352, 1354 (1998) (claims never raised in state court are barred from federal habeas review). Petitioner's case also is distinguishable from Agard because on rehearing in that case the Second Circuit expressly retreated from any suggestion "that it is constitutional error for a prosecutor to make a factual argument that a defendant used his familiarity with the testimony of the prosecution witnesses to tailor his own...testimony." See Agard, 159 F.3d at 99. No such "factual argument" was made in Agard, where the prosecutor focused "solely on [the defendant's] presence in the courtroom." Id. In Williams' case, the prosecutor's argument to the jury, not only was unobjected to, but made a specific, fact-based assertion that Williams had tailored his testimony based upon the testimony of the prosecution witnesses which he had heard before taking the witness stand. (JA 303-305).

[6] Federal collateral relief also would be barred under 28 U.S.C. § 2254(d) (forbidding federal habeas relief unless state court decision "unreasonable" under existing precedent).

Williams acknowledged as much by asserting merely that the rule he is seeking is "implicit" in this Court's prior decisions. (Resp. App. 6). To the contrary, this Court expressly recognized in Brooks that the risk that a defendant may color his testimony based upon having heard other witnesses testify is a matter best left to the jury's role in assessing the credibility of witnesses. See Brooks, 406 U.S. at 611.

Finally, the Fourth Circuit's fact-specific application of Brecht's clearly-established harmless error standard to petitioner's claim does not warrant this Court's review. See U.S.S.Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law"); Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J.) ("an intensely fact-specific case in which the court below unquestionably applied the correct rule and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original). Here, the Fourth Circuit correctly stated the Brecht standard and reasonably concluded that, in view the of "devastating" impact of Williams' highly inculpatory testimony on direct examination, the prosecutor's subsequent cross-examination regarding his having heard all the other witnesses testify before he testified could not have had the required "substantial and injurious effect or influence" upon the jury's verdict.[7] See

[7] It is undisputed that Mr. and Mrs. Keller were murdered premeditatedly during the course of a robbery in which Williams was a full and willing participant. It also is undisputed that Mrs. Keller was raped. And, as the Virginia Supreme Court noted, while the testimony of Williams and his co-defendant was at odds on some of the details of the crimes, ***Williams admitted before the jury that he initiated the idea of a robbery, that it was his idea to burn down the victims' house and, most importantly, that he shot Mr. Keller in the head after both victims were marched into the woods behind their home to be executed***. See Williams, 450 S.E.2d at 370. Thus, as both the district court and the Fourth Circuit concluded, by Williams' own admission he was guilty of a premeditated murder during the commission of a robbery, subsequent to the commission of a rape and during the same act or transaction where another premeditated murder occurred. Williams, ___ F.3d at ___ (Ptn. App. 5); Williams, 6 F. Supp. 2d at 548 (Ptn. App. 18-19); see generally Briley v. Commonwealth, 273 S.E.2d 57, 63 (Va. 1980) ("It is only necessary to prove that the defendant was the triggerman in the murder and an accomplice in the robbery or rape to convict him of capital murder"). Williams is simply wrong when he asserts that he "could be convicted of the capital

Williams, ___ F.3d at ___. (Ptn. App. 7). There is no "compelling reason" to review such a fact-specific application of a correctly stated principle of established law.

II. PETITIONER'S CONTENTION ABOUT AN ALLEGED "CONFLICT" REGARDING THE INTERPRETATION OF § 2254(e)(2) IS MOOT BECAUSE THE FOURTH CIRCUIT RULED THAT HE WAS NOT ENTITLED TO A FEDERAL EVIDENTIARY HEARING EVEN UNDER PRE-AEDPA LAW.

According to Williams, this Court should stay his execution and grant certiorari because the Fourth Circuit's interpretation of § 2254(e)(2) in his case supposedly creates a "conflict" with the decisions of every other court of appeals that has interpreted the statute. (Ptn. 27). This argument must fail, however, ***because the Fourth Circuit's judgment – that Williams is not entitled to a federal evidentiary hearing – would remain precisely the same even if § 2254(e)(2) never had been enacted***. Obviously, this Court should not grant certiorari or stay Williams' execution in order to review an issue that will not affect the Fourth Circuit's decision to deny collateral relief. See generally Black v. Cutter Laboratories, 351 U.S. at 297-298 (purpose of certiorari is to review "judgments, not statements in opinions").

The Fourth Circuit did conclude that the district court correctly had decided that § 2254(e)(2) barred a federal evidentiary hearing on Williams' two claims involving Juror Bonnie Stinnett and his claim involving the prosecution's alleged failure to disclose a psychological report involving the testifying co-defendant, Jeffrey Cruse, ***none of which ever had been raised***

murder of Mr. Keller only if the jurors concluded [that] Williams' one [admitted] shot resulted in a fatal wound." (Ptn. 21 n.11). As the Fourth Circuit noted, the medical examiner "testified that each gunshot wound suffered by Mr. Keller contributed to his death." Williams, ___ F.3d at ___. (Ptn. App. 5).. Thus, Williams' admission under oath that he fired the first shot into Mr. Keller's head clearly satisfied the requirement of Virginia law that the defendant played a "direct part" in causing the victim's death. See Strickler v. Commonwealth, 404 S.E.2d 227, 235 (Va.), cert. denied, 502 U.S. 944 (1991).

in state court. See Williams, ___ F.3d at ___. (Ptn. App. 4-5). The Court of Appeals' published opinion, however, clearly demonstrates that the outcome of Williams' case would be the same regardless of how § 2254(e)(2) is interpreted or whether it is applied to Williams' claims: "Even were section 2254[(e)(2)] not to apply, Williams would be unable to show his eligibility for a hearing under pre-AEDPA law." Id. at ___. (Ptn. App. 5). The Fourth Circuit then applied the pre-AEDPA standard established by this Court in Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), and concluded that "Williams can show neither cause for nor prejudice from his failure to raise the aforementioned Sixth Amendment and Brady claims in state court." See Williams, ___ F.3d at ___. (Ptn. App. 5). Thus, regardless of how the district court and the Fourth Circuit interpreted § 2254(e)(2) and, regardless of Williams' arguments as to why the statute should not have been applied to his claims, such matters clearly are irrelevant to the ultimate disposition of Williams' case.[8]

[8] Although the Fourth Circuit's interpretation of § 2254(e)(2) is a moot point for purposes of Williams' certiorari petition, the court below clearly was correct in applying § 2254(e)(2) to Williams' claims ***because they never were raised in state court and, therefore, are defaulted***. See Breard v. Greene, 118 S.Ct. at 1355 (citing § 2254(e)(2) for the proposition that Breard could not develop facts at a federal evidentiary hearing regarding a treaty claim he never raised in state court). The Fourth Circuit's application of § 2254(e)(2) to such defaulted claims is not, as Williams contends, in "conflict" with the decisions of other federal appeals courts. (Ptn. 27-28). All of the cases cited by Williams as support for such a "conflict" dealt with claims that the prisoner, in fact, had raised in state court and preserved for federal review. See Miller v. Champion, 161 F.3d 1249, 1251-1252 (10th Cir. 1998) (same ineffective counsel claim had been raised in state collateral proceeding); McDonald v. Johnson, 139 F.3d 1056, 1058 (5th Cir. 1998) (same); Burris v. Parke, 116 F.3d 256, 257 (7th Cir. 1997) (same); Jones v. Wood, 114 F.3d 1002, 1007, 1012 (9th Cir. 1997) (same); Love v. Morton, 112 F.3d 131, 136 (3d Cir. 1997) (same double jeopardy claim had been raised in state court on direct appeal). If, unlike the Fourth Circuit, a lower federal court ruled that § 2254(e)(2) did not apply to a claim never raised in state court, there would be a "conflict," but it would be a conflict with this Court's decision in Breard where, just as in petitioner's case, there was no discovery or evidentiary hearing during the state habeas proceedings because the prisoner simply never had raised the claim in state court.

Petitioner also contends, of course, that the Fourth Circuit wrongly concluded that he had failed to satisfy Keeney's "cause and prejudice" standard. (Ptn. 31-33). This argument, however, amounts to nothing more than the all-too-common allegation that the court below erred in applying established law to the particular facts of a petitioner's case. See Rule 10 ("A petition...is rarely granted when the asserted error consists of...the [alleged] misapplication of a properly stated rule of law"). The "cause and prejudice" standard unquestionably is firmly-established, and this Court should not grant certiorari merely to review the Fourth Circuit's fact-specific application of that standard to petitioner's claims.

Much of Williams' petition is devoted to arguments as to why there supposedly is "cause" to excuse his defaulted claims. Such arguments are moot, however, because the governing standard requires a showing of both "cause" ***and*** "prejudice," and the Fourth Circuit also concluded that "Williams is...unable to demonstrate prejudice," i.e., "that, absent the alleged constitutional violation, the outcome of the case likely would have been different." See Williams, ___ F.3d at ___. (Ptn. App. 5).

With respect to Williams' claims involving Juror Stinnett, the Fourth Circuit made the following findings regarding the lack of "prejudice":

> Williams' claims with respect to juror Stinnett were marginal. It is hardly clear that Stinnett was related to Deputy Sheriff Meinhard given that the two divorced some fifteen years before Williams' trial. Furthermore, Meinhard's testimony was brief and did not speak to the critical facts of the trial. In fact, Williams' trial attorneys saw no need to cross-examine him. And the prosecutor explained his failure to notify the court of the relationship in an affidavit in which he stated that he simply did not remember being involved in Stinnett's divorce – a plausible claim given that the divorce occurred fifteen years prior to Williams' trial and was uncontested. Finally, it is anything but clear that a divorce from one of the Commonwealth's witnesses would predispose a juror toward the Commonwealth's case.

Williams, ___ F.3d at ___. (Ptn. App. 5).[9] And, with respect to petitioner's claim involving the alleged non-disclosure of Cruse's psychological report, the Court of Appeals referred back to its prior discussion of the significance of petitioner's highly inculpatory trial testimony, and concluded that there was no reasonable probability of a different result even if the report had been disclosed. (Id.).

This Court, therefore, certainly should not grant certiorari to review any "cause" issue that clearly would have no ultimate effect on the Fourth Circuit's decision to deny relief for lack of "prejudice." In any event, the Court of Appeals correctly concluded that there was no "cause" for petitioner's defaults:

The "Juror Stinnett" claims:

At the time of voir dire, Stinnett had been divorced from Deputy Sheriff Claude Meinhard for approximately 15 years. (JA 1425a). Given the length of time the two had been divorced, Stinnett understandably believed that Meinhard was neither "related" to her nor a member of her "immediate family." (JA 1425a-1425b). She never discussed the case with Meinhard and, in fact, since their divorce in 1979, they have spoken "only one or two times a year."[10] (JA 1425a). "The fact that [Meinhard] was a witness in the case made no difference to [Stinnett] one way or the other, and certainly didn't cause [her] to favor the Commonwealth or the defendant." (Id.). As the Fourth

[9] The claims involving Juror Stinnett never could result in the granting of federal collateral relief because her responses on voir dire cannot reasonably be deemed "dishonest" and because, in any event, full disclosure of the relevant facts would not have provided Williams with a valid challenge for cause. See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 555-556 (1984).

[10] Williams asserts in conclusory fashion that the juror's affidavit regarding her limited contact with her ex-husband after the divorce "was not credible." (Ptn. 11). Williams, however, never has proffered any evidence from Meinhard or anyone else to contradict the juror's sworn statement.

Circuit found, see Williams, ___ F.3d at ___ (Ptn. App. 5), the record shows that Meinhard was a relatively insignificant witness at trial and that Williams' attorneys saw no need even to cross-examine him. (JA 78-85). Williams' assertion that Meinhard "was one of the officers who interviewed Cruse" (Ptn. 10) is misleading, because the record shows that when Meinhard was present the police "didn't learn much" from Cruse and that Meinhard was ***not*** present when Cruse later admitted his role in the murders to another officer. (JA 80-81, 84-85).

As to Stinnett's prior association with the prosecutor, the juror did not consider the prosecutor to have "represented" either her or Meinhard in their uncontested divorce. (JA 1425a). Although the prosecutor apparently had been the attorney who "drew up" the divorce papers, he had (and has) no recollection of having been involved in the divorce proceedings. (JA 1425c-1425d). Like Stinnett, moreover, although the prosecutor knew that Stinnett and Meinhard had been married in the distant past, he did not consider them to be "related" once they were divorced. (JA 1425c).

Based upon these record facts, the Fourth Circuit reached the following conclusions regarding Williams' undisputed failure to raise his "Juror Stinnett" claims in state court:

> ***The documents supporting Williams' Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well.*** Williams' [state habeas] request for investigative assistance was also deficient. He alluded vaguely to "irregularities, improprieties and omissions" with regard to jury selection and asked for an investigator to examine "all circumstances relating to the empanelment of the jury and the jury's consideration of the case." This request in no way alerted the state habeas court to any specific claim. [Citation omitted]. ***The failure to develop the Sixth Amendment claims was thus attributable to petitioner, not to the Supreme Court of Virginia's rejection of a fishing expedition request.***
>
> * * *
>
> To demonstrate cause, Williams must establish that "'some objective factor external to the defense impeded counsel's efforts.'"

> McCleskey v. Zant, 499 U.S. 467, 493 (1991) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). As noted, ***Williams' failure to develop the facts in state court was due to his own lack of diligence. Williams neither brought forth reasonably available facts, nor made reasonable efforts to convince the Supreme Court of Virginia that additional discovery was warranted.***

Williams, ___ F.3d at ___ (emphasis added). (Ptn. App. 4-5). There simply is no "compelling reason" to review the Fourth Circuit's fact-specific application of firmly-established law.

The "Brady" claim:

The district court correctly concluded that Williams' claim that the prosecution failed to disclose Cruse's psychological evaluation to the defense was barred by Williams' failure to raise the claim in state court. (JA 1302-1303). The Fourth Circuit concurred in this conclusion. See Williams, ___ F.3d at ___. (Ptn. App. 5). As "cause" for his default, Williams asserts that he made diligent efforts to develop his claim in state court and that the Virginia Supreme Court denied his discovery motion during the state habeas proceedings. (Ptn. 7-8, 33-34). The discovery motion to which Williams refers, however, had nothing to do with a psychiatric report concerning Cruse; it dealt solely with a request for an order requiring the Commonwealth to disclose Cruse's place of imprisonment.[11] (JA 398-399). Williams also complains that the state habeas court denied his request for an investigator. (Pet. Br. 38). That request, however, had nothing to do with access to Cruse's psychiatric report; it mentioned only in the broadest terms "issues relating to the testimony

[11] Williams murdered six persons within a short period of time and Cruse testified against him at great personal risk. Cruse is being incarcerated outside of Virginia and the Commonwealth, in order to protect Cruse, has declined to reveal his location without being ordered to do so by a court of competent jurisdiction. (JA 391, 401-403). Both the Virginia Supreme Court and the district court prudently declined Williams' request to issue such an order. (JA 398-399, 502, 1247, 1253, 1590). Williams' suggestion that the Commonwealth somehow prevented him from interviewing Cruse (Ptn. 27 n.13) is false. In 1997, a letter from Williams' investigator, Alfred C. Brown, was forwarded to Cruse and Cruse's decision not to respond to the letter was his choice, not the Commonwealth's. (JA 1602-1603).

and status...of Jeffrey Cruse." (JA 383).

Williams acknowledges, moreover, that his federal habeas counsel readily found the psychological report ***as a matter of public record in Cruse's case file in Cumberland County Circuit Court*** (JA 865-867), but he suggests that the report was not in the file when his state habeas counsel examined the file in 1995.[12] (Ptn. ___). He relies upon his state habeas counsel's affidavit which Williams submitted to the district court only ***after*** the court had dismissed the Brady claim as defaulted.[13] As the Fourth Circuit noted (Ptn. App. 5), however, the most state habeas counsel was willing to say was that, in April of 1998, he had "no recollection of seeing this report in Mr. Cruse's court file when [he] examined the file [in 1995]." (JA 1500). State habeas counsel's further assertion that he would have raised a Brady claim in state court "[i]f [he] had seen the report" (JA 1501) demonstrates at most that counsel did not "see" or notice the report when he examined Cruse's file in

[12] According to Williams, "[g]iven its sensitive nature, the report clearly had been improperly placed in a public file." (Ptn. 10). There is, however, no evidence in the record to support such speculation. Indeed, if the report supposedly was so sensitive or confidential, Williams' habeas attorney would not have been afforded the free access to Cruse's court file that he obviously was permitted. (JA 1500).

[13] Williams first raised the Brady claim based upon the psychiatric report when he filed his federal petition in November 1996. Prior to the district court's dismissal of the claim on April 13, 1998 (JA 1301-1303), Williams never had submitted an affidavit from state habeas counsel. The affidavit was submitted for the first time on April 27, 1998, in support of Williams' Rule 59(e) motion. (JA 1459-1460).

1995, ***not*** that the report was not then in the file just as it later was when found by federal habeas counsel.[14]

The district court correctly rejected Williams' complaints about the adequacy of the state habeas proceedings to develop his claim: "Williams has apparently been afforded the same type of assistance at both state and federal habeas – namely, court-appointed attorneys. The Court cannot discern any reason and has been offered no explanation why state habeas counsel failed to discover the report and present [the Brady claim] in state habeas proceedings." (JA 1303). The Fourth Circuit expressly agreed with this conclusion. See Williams, ___ F.3d at ___. (Ptn. App. 5). The mere fact that state habeas counsel failed to see, or discern the significance of, the report when he examined Cruse's public court file cannot serve as "cause" for Williams' failure to raise the claim in state court. See Coleman v. Thompson, 501 U.S. 722, 754-755 (1991) (alleged error by state habeas counsel cannot serve as "cause" for claim defaulted on state collateral review.").

Williams' suggestion that the prosecution's failure to disclose the report ***at trial*** somehow could constitute "cause" for the default of his Brady claim during the state collateral proceedings not only assumes without support that the prosecution had actual or constructive knowledge of

[14] Of course, in order to obtain federal collateral relief, Williams would have to show, not only that the report was unavailable when he filed his state habeas petition, but also that the report was not in Cruse's court file ***at the time of Williams' trial***. Williams never has offered any evidence that his trial attorneys were unaware of the report, or that they did not determine, as a matter of strategy, that on balance the report could have done more harm than good (JA 865: indicating Cruse told the evaluator that Williams had forced him to participate in the murders and that Cruse was extremely remorseful regarding his role) or that it would have been counter-productive to attempt to impeach Cruse on the basis of the report. Indeed, the record shows that Williams himself insisted upon testifying and relating to the jury his version of the events and that, despite his own drug and alcohol use prior to the murders, he was able to recall and relate those events in great detail. (JA 1156 at ¶ 13, 1161 at ¶ 27). Finally, the record evidence as a whole, including Williams' highly inculpatory testimony, demonstrates that the report was not "material" under United States v. Bagley, 473 U.S. 667, 674-675 (1985) (must show reasonable probability of different result).

the report, but also misperceives the concept of "cause." This Court never has suggested that the claim itself may supply "cause" for the default of the claim. See Gray v. Netherland, 518 U.S. 152, 162 (1996) (holding Brady claim defaulted by failure to raise it in state court). The reason the Court never has done so is obvious: such an ill-advised extension would eviscerate the default doctrine completely.[15]

Strickler inapposite

Williams' reliance upon Strickler v. Greene, 119 S.Ct. 1936 (1999), is misplaced. According to petitioner, this Court's conclusion that Strickler had demonstrated sufficient "cause" to excuse his failure to raise his "Brady" claim during his state habeas proceedings requires a similar conclusion here with respect to petitioner's defaulted claims. (Ptn. 32). Strickler, however, simply has nothing to do with Williams' case.[16]

This Court expressly declined to decide in Strickler whether any one of three factors, by itself, was sufficient to constitute "cause" because "the combination of all three surely suffices." See Strickler, 119 S.Ct. at 1952. Those factors were: "(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's

[15] For example, Williams argues that his claims regarding Juror Stinnett's allegedly untruthful answers on voir dire should be excused because during voir dire "[t]he jurors answered under oath,...trial counsel had no reason to doubt her veracity....[and] if it was reasonable for trial counsel to rely on such representations made during trial, it was equally reasonable for state habeas counsel to rely on those same representations." (Ptn. 32).

[16] Williams' case was argued in the Fourth Circuit on June 7, 1999. Strickler was decided by this Court on June 17. At no time prior to the Fourth Circuit's decision in Williams' case on August 2 did his counsel bring this Court's decision in Strickler to the Court of Appeals' attention. Williams' counsel, Ms. Hartung, was also one of Strickler's attorneys.

reliance on the open file policy by asserting during state habeas proceedings that petitioner already received "everything known to the government." Id. The Court expressly noted, however, that it was the third factor, i.e., the Commonwealth's express representation to Strickler during the state habeas proceedings that rendered "[t]he Commonwealth's position on the 'cause' issue...particularly weak." Id. at 1951.

None of the factors specified in Strickler is present in petitioner's case. During the state habeas proceedings, the Commonwealth certainly made no representation to Williams regarding whether he had been provided all that he was entitled to at trial. The concept of a trial prosecutor's "open file policy," moreover, simply has nothing to do with Williams' claim regarding Cruse's psychological report, which was contained ***in Cruise's public court file***, not in the prosecutor's files or the police files maintained in Williams' case. And, finally, there is no evidence that the prosecution withheld the report from Williams or that the prosecution had any greater access to the report than he did.

III. THE FOURTH CIRCUIT'S REJECTION OF PETITIONER'S "UNDISCLOSED PLEA AGREEMENT" CLAIM UNDER PRE-AEDPA LAW DOES NOT WARRANT THIS COURT'S REVIEW.

Williams contends that, notwithstanding Jeffrey Cruse's trial testimony to the contrary, Cruse actually had an agreement with the prosecution whereby he would be spared a death sentence in return for his testimony against petitioner.[17] To the extent that Williams suggests

[17] This claim has three component parts, ***two of which clearly are defaulted***. One part of the claim is that the prosecution failed to provide the defense with a copy of Cruse's original, but later breached, written plea agreement. This was claim IV(A) in Williams' state habeas petition (JA 1076-1078) and the Virginia Supreme Court expressly applied Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974), to the claim because it clearly could have been raised at trial and on direct appeal. (JA 502). Another part of the claim is that the prosecution affirmatively misled the jury regarding whether there was an agreement with Cruse at the time he testified. This claim was ***never*** raised in state court and, therefore, is procedurally defaulted. See Gray v. Netherland, 518 U.S. at 162. Thus, the ***only*** aspect of Williams' claim that is not defaulted is the allegation that the prosecution

that this Court should grant certiorari on this claim in order to review the Fourth Circuit's interpretation of § 2254(e)(2) (Ptn. 34) or § 2254(d)(1) (Ptn. 14, n.8), the suggestion has no merit because the Court of Appeals' opinion clearly demonstrates that it rejected Williams' claim under pre-AEDPA law. Once again, this Court should not grant certiorari to review the Fourth Circuit's interpretation of particular provisions of AEDPA when, as here, it is clear that the prisoner's claim could not succeed even if AEDPA never had been enacted.

Facts:

It is undisputed that Cruse and the Commonwealth initially had a written agreement whereby Cruse would be spared the death penalty in exchange for his truthful cooperation and testimony against Williams. (JA 23). The Commonwealth, however, revoked the agreement prior to trial when it learned that Cruse had not told the truth regarding whether Mrs. Keller had been raped. Once it was learned that Mrs. Keller had been raped by both Cruse and Williams, the Commonwealth revoked the agreement, and Cruse testified at Williams' trial without the benefit of any agreement. See Williams v. Commonwealth, 450 S.E.2d at 370, 374. The record also shows that defense counsel knew about Cruse's breached plea agreement and cross-examined him regarding his sworn testimony that he was testifying for the prosecution without the benefit of such an agreement. (JA 165-171, 176-178, 1155).[18]

failed to reveal that, at the time he testified, Cruse allegedly had a secret agreement or understanding with the Commonwealth whereby he would be spared a death sentence. This was claim IV(C) in Williams' state habeas petition (JA 1080-1084) and the Virginia Supreme Court expressly found it had "no merit." (JA 502).

[18] Trial counsel's affidavit states that he "was aware prior to trial of the substance of [the] agreement." (JA 412). The prosecutor, moreover, stated in an affidavit that he was "confident" the defense had received a copy of the revoked agreement before trial. (JA 1398).

When Williams alleged in his state habeas petition that there was an undisclosed agreement between Cruse and the prosecution (JA 1080-1084), ***the Commonwealth responded with unequivocal, unrefuted affidavits from the trial prosecutor (who now is a Virginia judge) and from Cruse's trial attorney, both of whom swore under oath that the allegation was untrue and that Cruse testified truthfully at trial that he had no agreement and that he remained charged with capital murder and subject to the death penalty***. (JA 1398-1401).

Williams failed to develop ***any*** facts in support of his claim in state court. He submitted no counter-affidavits and, in fact, he presented the Virginia Supreme Court with a transcript of Cruse's guilty plea proceeding, which occurred more than two months ***after*** Cruse testified against Williams, showing that even then Cruse had no agreement with the Commonwealth and remained charged with capital murder and subject to the death penalty. (JA 437-438). The Virginia Supreme Court understandably rejected the claim on the basis of the unrefuted, overwhelming evidence.[19]

No merit:

It is beyond question that the Fourth Circuit did not apply § 2254(e)(2) to Williams' claim regarding Cruse's allegedly secret agreement. And, while the Court of Appeals recited its interpretation of § 2254(d)(1) before it addressed either of Williams' claims that the Virginia

[19] Williams asserts that he has "alleged numerous facts demonstrating that an undisclosed sentence agreement existed." (Ptn. 34). The "facts" to which he refers, however, are matters either contained in the trial record or otherwise available since the time of trial. (Ptn. App. 75-76). To the extent his claim is based upon such facts, it clearly is both defaulted and without merit. If the factual predicate for the claim is contained in the trial record, the claim is defaulted because Williams could have raised the claim at trial and on direct appeal. ***The claim also has no merit because matters spread upon the trial record, by definition, do not fall within the "Brady" rule***. Finally, to the extent Williams suggests that the state habeas court's denial of his discovery motion should excuse his failure to proffer any evidence in support of his claim, the suggestion must be rejected. On two separate occasions in the district court, two different federal judges independently concluded that Williams had failed to demonstrate the required "good cause" for discovery. (JA 1253, 1368-1372, 1574). If discovery was unwarranted in federal court, the state court certainly cannot be faulted for denying discovery.

Supreme Court had rejected on the merits, its actual analysis of Williams' claim regarding Cruse demonstrates that the Fourth Circuit rejected the claim under a pre-AEDPA, de novo standard of review:

> Williams...claims that the prosecution suppressed an alleged informal plea agreement that the Commonwealth had with Cruse in violation of Brady. ***The Supreme Court of Virginia was correct, however, to reject Williams' claim***. In state court the Commonwealth supplied two affidavits – one from Woodson and one from Cruse's trial counsel, Donald Blessing – stating unequivocally that Cruse had no agreement. Specifically, Woodson swore: "At the time Cruse testified against Williams in January of 1994, he had no plea agreement. Cruse testified truthfully that there was no plea agreement and that he remained charged with capital murder and subject to the death penalty." Similarly, Blessing stated, "Cruse testified truthfully at...trial that he had no plea agreement, that he remained charged with capital murder for the Cumberland offenses, and that he was subject to a possible death sentence."
>
> ***Moreover, before the district court, the Commonwealth introduced another affidavit from Blessing, in which he swore, "At the time Cruse testified against Williams in Cumberland County, he had no agreement or understanding, formal or informal, with the Commonwealth."***[20] The district court thus properly credited the state court's judgment, and there is no reason for federal courts to revisit the state court's determination in a federal hearing in view of the unrefuted evidence. See Eaton v. Angelone,139 F.3d 990, 995 (4th Cir.) (refusing to transform "a federal habeas proceeding into a second trial."), cert. denied, 118 S.Ct. 2338 (1998); Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994) (upholding denial of habeas corpus on basis of trial counsel's affidavit); Sawyers v. Collins, 986 F.2d 1493, 1504 (5th Cir. 1993) (en banc) (upholding denial of habeas corpus without evidentiary hearing even when state court made factual determination solely on basis of affidavits).
>
> ***Finally, even if Williams could demonstrate that Cruse had an***

[20] Williams' federal habeas counsel asked Cruse's trial counsel, Mr. Blessing, to sign an affidavit in support of the claim but Blessing refused to sign it. He later submitted another affidavit to the district court, unequivocally reaffirming not only that Cruse "had no agreement or understanding, formal or informal, with the Commonwealth," but also stating that he had refused to sign the affidavit proffered to him by petitioner's federal habeas counsel because paragraph 5 of the proposed affidavit was "not true." (JA 1402-1405).

> ***informal plea agreement, he could not show materiality***. See Kyles v Whitley, 514 U.S. 419 (1995) (demonstration of a Brady claim requires a showing of materiality). Given Williams' own testimony that he was least an accomplice in the rape of Mrs. Keller and that he shot Mr. Keller in the head, we are confident there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 433-434 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). As a result, ***we agree that Williams failed to demonstrate a Brady violation***.

Williams, ___ F.3d at ___ (emphasis added). (Ptn. App. 6). The Fourth Circuit's conclusion that the state court "was correct" and its statement that it "agreed" with the state court's conclusion that there was no Brady violation certainly connote de novo review.[21]

Williams never has adduced ***any*** evidence which, if presented at an evidentiary hearing and found to be true, would support the granting of federal collateral relief. Here, as in state court, the ***only*** evidence is that Cruse testified truthfully when he stated that he had no agreement with the prosecution at the time of trial. Federal habeas law never has entitled a petitioner to an evidentiary hearing under such circumstances. Moreover, the Fourth Circuit's fact-specific determination that Williams could not demonstrate the required "materiality" under Bagley, even if there were such an undisclosed agreement, renders moot Williams' contention that a hearing was necessary to determine whether such an agreement existed.

IV. THERE IS NO "COMPELLING REASON" TO REVIEW THE FOURTH CIRCUIT'S INTERPRETATION OF 21 U.S.C. § 848(q)(9).

Williams contends that this Court should stay his execution and grant certiorari to review

[21] The Fourth Circuit's citation to its prior decisions in Eaton and Spencer clearly demonstrates that it applied pre-AEDPA law pertaining to a petitioner's entitlement to a federal evidentiary hearing. Williams contends that the Fourth Circuit erred by stating that the district court "credited the state court's judgment." (Ptn. 14). But, of course, that is precisely what the district court did when, after it determined that Williams was not entitled to an evidentiary hearing, it rejected his claim on the basis of the existing record.

the Fourth Circuit's straightforward interpretation of the plain language of 21 U.S.C. § 848(q)(9): "No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." (Ptn. 35-40). This contention should be rejected for several reasons.

Petitioner cites no decision of any other court of appeals that "conflicts" with the Fourth Circuit's interpretation of § 848(q)(9). Indeed, it appears that the Fourth Circuit's decision in Williams' case is the only court of appeals opinion which has interpreted the particular provision of the statute at issue here. Under these circumstances, this Court should not grant certiorari, if ever, until the particular issue has "percolated" for a sufficient time in the lower federal courts. See Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting), citing McCray v. New York, 461 U.S. 961, 962-963 (1983) (Stevens, J., respecting denial of certiorari). In any event, this Court certainly should not grant a stay in a state prisoner's capital case to review what amounts to nothing more than a mere collateral issue within an already collateral case.

Facts:

On September 3, 1996, more than two months before he filed any federal habeas claims, Williams filed "ex parte and under seal" a request for the expert services of a neuropsychologist, a "mitigation specialist," an investigator[22] and a pathologist. (JA 524-544). On September 5, 1996, the district court granted the request in a sealed order which was not provided to respondent's counsel. (JA 545). Williams supplemented his ex parte motion the next day, requesting the

[22] Williams' assertion that he was denied the services of an investigator at public expense is belied by the letter dated July 29, 1997, from his investigator to Jeffrey Cruse on the letterhead of the Virginia Capital Representation Resource Center – ***a state funded agency*** – in which the investigator stated that he was "assigned to work on the Michael Williams case." (JA 1602-1603).

appointment of two hand-picked experts. (JA 546-547). In yet another ex parte sealed order, the district court granted Williams' requests on September 13, 1996. (JA 548).

The lower court entered the ex parte orders even though the Warden's counsel had written a letter to the court on August 16, 1996, advising of AEDPA's recent amendment of § 848(q)(9) which prohibited ex parte proceedings except upon a showing of a "need for confidentiality." (JA 523). When the Warden's counsel serendipitously learned of the district court's ex parte orders and raised the matter with the court, the court stayed its ex parte orders on September 18, 1996. (JA 549). Both parties then filed pleadings on the issue of whether the required showing of a "need for confidentiality" must be made at an adversarial proceeding. (JA 4). On October 7, 1996, the court agreed with the Warden that the required showing cannot be made at an ex parte proceeding.[23] (JA 550).

An adversarial proceeding was scheduled for October 23, 1996. At that hearing, however, Williams refused to go forward on the issue of "need for confidentiality," insisting that the statute permitted that such a showing could be made in an ex parte proceeding and that requiring him to go forward with the Warden's counsel present would force him to reveal confidential "strategy." (JA 558-561). Initially, the court indicated a willingness to consider an ex parte written statement by Williams of the claims he intended to raise and how they related to his requests for expert assistance. (JA 561, 577). The next day, however, Williams merely filed yet another "ex parte and under seal" pleading requesting leave to proceed ex parte on his request for expert assistance and with respect to

[23] As the district judge in Williams' case expressly asked: "How can I decide whether [the claims at which the request for expert assistance is directed] are procedurally blocked...without help from the Attorney General's Office?" (JA 561). Thus, the district court's earlier uninformed, ex parte conclusion that the services Williams had requested were reasonably necessary (Ptn. 38 n.16) cannot aid petitioner. It should not be surprising when a circumvention of the adversarial process results in an erroneous decision in favor of the party that improperly was afforded an ex parte proceeding.

showing a "need for confidentiality." (JA 579-596). On October 31, 1996, the district court issued an order stating that it would refrain from reviewing Williams' October 24 ex parte submission until the Fourth Circuit rendered a decision as to whether the Warden was entitled to access to what Williams had filed.[24] (JA 661).

Williams took no further action on his request for expert assistance before filing his habeas petition on November 20, 1996. (JA 6-7). On December 10, 1996, he filed another motion renewing his request for leave to proceed "ex parte and under seal" on his request for expert assistance. Even though Williams already had filed his habeas petition and delineated his claims, the December 10 motion made no attempt to relate his request for expert assistance to any particular claim raised in his petition. (JA 7; docket entry #50).

The record shows that Williams took no further action with respect to his request for expert assistance ***for the next 16 months*** before April 10, 1998, when the district court merely wrote the word "denied" on the sealed ex parte pleading Williams had filed on October 24, 1996. (JA 7-12, 1270-1271). At no time while the case was in the district court did Williams ever agree to pursue his request for expert assistance or the required "need for confidentiality" in an adversarial setting. To the contrary, Williams refused to litigate those issues in any proceeding in which the Warden's counsel was a participant.

No merit:

Prior to AEDPA, § 848(q)(9) authorized state prisoners under sentence of death to make ex parte requests for expert assistance in connection with their federal habeas proceedings. In 1996,

[24] Williams had filed an interlocutory appeal challenging the order dated October 7, 1996, in which the district court had directed that an adversarial hearing be held on the "need for confidentiality" issue. (JA 597). He subsequently appealed the district court's October 31 order as well. (JA 662). The Fourth Circuit dismissed the interlocutory appeals on November 19, 1996, for lack of jurisdiction. (JA 664).

however, as part of an overall reform of federal habeas proceedings, Congress added the following language to the statute: "No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality." The language employed by Congress could not be any clearer: there may be absolutely "no" ex parte communications with the court regarding a request for expert assistance "unless" the prisoner demonstrates a "need for confidentiality."

Williams contends that, despite Congress' unequivocal language, the statute nevertheless entitles him to litigate the "need for confidentiality" issue in an ex parte proceeding. In other words, even though Congress has mandated that a showing of a "need for confidentiality" is an absolute prerequisite to any ex parte contact with the court, he nevertheless is entitled to an ex parte contact with the court in order to determine whether the prerequisite exists. The Fourth Circuit correctly rejected Williams' argument as being, not only "convoluted," but contrary to "the plain language of the statute." See Williams, ___ F.3d at ___. (Ptn. App. 7-8).[25]

Finally, neither in any of his ex parte filings in the district court (JA 525, 593-595) nor in the Fourth Circuit did Williams make "a proper showing... concerning the need for confidentiality" ***in his case***. See § 848(q)(9). Generic allegations about a reluctance to reveal "strategy" or about the State's supposedly "superior resources" could be made in ***any*** capital habeas case.

[25] To the extent that Williams argues that it somehow would violate the Constitution if Congress intended what the Fourth Circuit says it intended (Ptn. 39-40), the argument is without merit. See generally Felker v. Turpin, 518 U.S. 651, 663-664 (1996) (Constitution not implicated by changes in § 2254 review of state court convictions). As the Fourth Circuit correctly concluded, even though a district court may not conduct an ex parte proceeding without first conducting an adversarial proceeding to determine if an ex parte proceeding is warranted, "[w]hat information is disclosed at that [adversarial] hearing would of course remain within the discretion of the district court." See Williams, ___ F.3d at ___ n.2. (Ptn. App. 8 n.2).

CONCLUSION

The petition for a writ of certiorari and the application for a stay of execution should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

breakdown of the PGM type. And then lastly, PepA stands for peptidase A. Again, we use the abbreviation, and it is another system in which I can type blood and body fluid samples in.

Now, these systems are inherited independently, and what I mean by that is that just because you are a particular type in one system does not predetermine what type you are in another system. So we use these systems to help describe or create a profile of the particular sample. For instance, if you were talking about a car, you might say it's a green car, it's a four-door, it's a Chevrolet. Well, with my particular typing system, I say that the particular sample is a PGM type whatever, subtype whatever, PepA type whatever, and those are descriptions as to what the sample is.

Q Did you have occasion to capture these systems from Morris Keller?

A Yes. On the known blood sample that was submitted to me from Morris Keller, the types I identified were PGM type 2-1, PGM subtype -- Remember, I said subtype is just a breakdown of the PGM system -- the subtype being a 2+1+, and the PepA type 1. Now, the numbers are what we use to describe what the type is. Where the A-B-O system used letters, these systems use numbers and plus and minus signs.

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Q Did you have occasion to do the same from the blood of Mary Elizabeth Keller?

A Yes. I also received a blood sample from Mary Keller and determined that the types were PGM type 2-1, subtype 2+1+, PepA type 1. Now, in looking at these two individuals, Mr. Keller and Mrs. Keller, you can see across that they do have the same types in the systems that I typed across.

Q And who did you type next, please?

A The next sample I have listed, I got a blood sample from Mr. Cruse, and the types, you can see, are PGM type 2-1, subtype 2+1-, PepA type 1. And you can see by looking across there that there is a difference in types in this PGM subtyping system. Mr. Cruse is a 2+1-, whereas both of the Kellers are 2+1+, and, therefore, I can distinguish Mr. Cruse from Mr. and Mrs. Keller.

Q Did you have occasion to type the defendant in this case, Michael Williams?

A Yes. I received a blood sample from Mr. Williams. The types you see are the PGM type 2-1, subtype 2-1+, PepA type 1. Now, in looking at all the four individuals involved, they all have the same PGM type, they all have the same PepA type, but this PGM subtyping system I can use to distinguish between the individuals in the case.

RESP. APP. 2

Q In this case, Michael Williams has a different PGM subtype than any of the other three?

A That is correct.

Q Did you have occasion to analyze the vaginal swabs taken by the medical examiner from the vaginal vault of Mary Elizabeth Keller?

A Yes. I examined the vaginal swabs and the vaginal smear from Mrs. Keller, and on those I identified spermatozoa, which is the male reproductive cell.

Q Did you have occasion to type the fluids that you found on those vaginal swabs?

A Yes. Because I did identify spermatozoa, that also means that there was seminal fluid present, because seminal fluid is made up of a fluid portion and a sperm portion. And in these systems that I test for, to get very technical, I am testing that fluid portion on the vaginal swabs. Now, the vaginal swabs, being that they were taken from the vaginal area, I can expect for there to be vaginal fluid from Mrs. Keller there, just because of where those swabs were taken from. I also identified spermatozoa, which means that those swabs are a mixture of vaginal fluid and seminal fluid. And you can see that the types I determined were PGM type 2-1, subtype 2+2-1+, and PepA type 1. Now, this 2+2-1+ is the mixture. And when I compare these types back to the known individuals in the

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case, the first thing I do is I look for something, I look for a type foreign to Mrs. Keller, because, remember, we said that there is vaginal fluid there. So in comparing this back to Mrs. Keller, the 2- is foreign. Mrs. Keller is a 2+1+. She is not capable of producing a 2-. So in looking at the individuals, from whom I have blood samples for, this 2-could have come from Mr. Williams. This 2-could not have come from Mr. Cruse. It could not have come from Mr. Keller. Therefore, my conclusion would be that if there was one donor of the seminal fluid, what I refer to in my report as a sole donor of the seminal fluid, Mr. Williams cannot be eliminated. However, if there were more than one donor of that seminal fluid, we've already said Mr. Williams cannot eliminated, but if there was more than one donor, Mr. Cruse and Mr. Keller could not be eliminated.

Q Between those four people, the only one up there that has a 2- is who?

A Mr. Williams.

Q The vaginal swabs captured 2-. Between those four people, the only one up there who could have deposited that 2- in the vaginal vault of Mary Elizabeth Keller would have been who?

A Mr. Williams.

Q Let me ask you, Ms. Schiermeier, what you

RESP. APP. 4

THE UNITED STATES DISTRIC. COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

MICHAEL WAYNE WILLIAMS,

Petitioner, Civil No. 3:96-CV-529

v.

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center,

Respondent.

PETITIONER MICHAEL WAYNE WILLIAMS'
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS
HIS INITIAL PETITION FOR A WRIT OF HABEAS CORPUS

Respondent has moved to dismiss Michael Williams petition for a writ of habeas corpus pursuant to Rule 5 of the Rules Governing Section 2254 Cases. For the reasons set forth herein and in Williams' prior pleadings, the motion should be denied.

EXHAUSTION

Under Virginia law effective July 1, 1995, death sentenced state prisoners are permitted only one state habeas petition. and it must be filed no later than 60 days after denial of certiorari on direct appeal. This restriction applies only to death row inmates. Va. Code § 8.01-654.1. Under prior state law, successive petitions were almost always prohibited. Va. Code § 8.01-654(B)(2). Thus, as Respondent has stated, no state court avenue for review remains open to Williams. All his claims are "exhausted" for purposes of federal habeas review under 28 U.S.C. § 2254(b).

THE NEW HABEAS CORPUS STATUTE DOES NOT
APPLY TO THIS PETITION

Respondent asserts without argument or analysis that the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), signed into law on April 24, 1996, controls

RESP. APP. 5

8. Williams' Constitutional Right To Be Present At Trial and To Confront His Witnesses Should Not Have Been The Subject Of Impeachment.

Respondent concedes that this claim is preserved, but argues that this Court would violate the "new rule" doctrine if relief is granted. Respondent's position is unfounded.

There is no need to establish a new rule in order to grant Williams relief on this claim. Existing constitutional principles established by the United States Supreme Court apply. In denying Williams relief, the Virginia Supreme Court wholly failed to apply these principles. This Court is not, therefore, required under 28 U.S.C. § 2254(d)(1) to defer to the Virginia Supreme Court's dismissal of this claim.

The Supreme Court long ago established the principle that the Constitution forbids prosecutorial comment upon a criminal defendant's exercise of his Fifth Amendment right not to testify. Griffin v. California, 380 U.S. 609 (1965). The defendant's Sixth Amendment right to confront witnesses against him serves an important function essential to a fair trial, namely, prevention of perjury by prosecution witnesses. Maryland v. Craig, 497 U.S. 836, 846 (1990); Coy v. Iowa, 487 U.S. 1012, 1019 (1988). The Sixth Amendment right confront prosecution witnesses is as essential to a fair trial as the Fifth Amendment right against self-incrimination. Coy v. Iowa, supra. Implicit in these Supreme Court decisions is principle that the Sixth Amendment forbids prosecutorial impeachment of a criminal defendant's testimony through cross-examination designed to show that the defendant exercised his right to be present at trial and confront his accusers. Griffin; Coy; Craig.

On direct appeal, the Virginia Supreme Court dismissed Williams' Sixth Amendment claim without addressing the principles established in Griffin, Coy, or Craig, stating only that the prosecutor's cross-examination of Williams regarding his presence during the testimony of other witnesses merely "reflected what the jury already knew." 248 Va. at 544, 450 S.E.2d at 375. This same rationale was expressly rejected by the United States Supreme Court in Griffin, where the State argued that prosecutorial comment upon the

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